EON BANK BHD

v.

BH STEEL SDN BHD;
GUAN SENG STEEL SDN BHD (INTERVENER)

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-205-2003]
14 OCTOBER 2004

LAND LAW: *Sale of land - Auction - Decision of registrar to extend time for registration of bidders - Whether decision appealable - Whether registrar had discretion to grant extension - Rules of the High Court 1980, O. 56 r. 1(1) - Courts of Judicature Act 1964, s. 3 - National Land Code, s. 259(1), (2)(a), (b)*

AUCTIONS AND AUCTIONEERS: *Sale of land - Bidding - Decision of registrar to extend time for registration of bidders - Whether decision appealable - Whether registrar had discretion to grant extension - Rules of the High Court 1980, O. 56 r. 1(1) - Courts of Judicature Act 1964, s. 3 - National Land Code, s. 259(1), (2)(a), (b)*

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Decision of registrar to extend time for registration of bidders - Whether purely a procedural ruling - Whether appealable - Rules of the High Court 1980, O. 56 r. 1(1) - Courts of Judicature Act 1964, s. 3*

This was an appeal by the intervener against the decision of the learned registrar allowing one Khoo Guan Swee ('Khoo') to offer a bid for a piece of land ('the land') in a public auction at 9.40am, which was after the time for the registration of bidders *ie*, 9.15am, had been closed. The intervener also sought a declaration that it was the sole successful bidder at the reserve price of RM435,000. The intervener had filled in the prescribed form and surrendered it, together with his identity card and a bank draft for RM43,500 as a deposit, to the court bailiff before 9.15am. The registrar went to the auction room to conduct the auction at 9.40am, where he met Khoo, who made an oral application for leave to be registered as a bidder. Despite the intervener's vehement objection to Khoo's application, the registrar, in exercising of his discretion to extend the time for registration, allowed the application. The auction then proceeded with the offer of bids from the two bidders concluding with the intervener as the successful

bidder at the purchase consideration of RM521,000. The issues requiring determination were: (i) whether, on the aforesaid facts, the registrar's extension of time was appealable; and (ii) whether the registrar had the discretion to grant an extension of time to allow the late registration of bidders after the bailiff had closed the registration at 9.15am.

Held (dismissing the appeal):

[1] The test for a party's right to appeal, be it in a civil or criminal proceeding, is to be determined by the element of finality in disposing of the party's rights and not merely a purely procedural ruling. The mere registration of the intervener as a bidder in a public auction was merely the first step in the entire proceedings for the conduct of the auction. The intervener's bid was still subject to the conditions contained in the proclamation of sale which meant that during the period between the time of registration of the intervener as a bidder and the acceptance of the intervener's bid, the intervener's right remained a contingent, and not a vested, right. Hence, the intervener's bid merely constituted an offer to purchase at the auction and unless the registrar accepted the offer, no legally binding contract had yet been brought into existence. In the circumstances, the extension of time granted by the registrar in order to allow Khoo to offer his bid in the public auction was purely a procedural ruling and did not finally dispose of the rights of the intervener as a bidder. This meant that it did not come within the scope, ambit and purview of "judgment, order or decision" under O. 56 r. 1(1) of the Rules of the High Court 1980 read with s. 3 of the Courts of Judicature Act 1964. The intervener, therefore, had no right to appeal against the extension of time. (pp 428 c-h & 429 a-b)

[2] On the facts, the registrar's order had made it abundantly clear and unambiguous that while the time for the auction had been fixed at 9.15am, the registrar could exercise his discretion so as to extend the auction time from 9.15 onwards as long as the auction was conducted on the auction date itself *ie*, 17 May 2004. Section 259(1) of the National Land Code ('the Code') provided for the auction to take place under the direction of an officer of the court, which in this respect, was the registrar. Furthermore, s. 259(2)(a) and (b) of the Code made it incumbent upon the registrar by way of a duty to receive the bids and settle summarily any question arising in the course of the

proceedings. These provisions were sufficiently wide to encompass the extension of time granted by the registrar for the purposes of the registration of a bidder such as Khoo as that was one of the questions that had arisen in the course of the proceedings relating to the auction. Thus, the registrar had not only exercised his discretion properly and reasonably, but had also discharged his duties under the Code. (pp 429 g-h & 430 a-f)

Case(s) referred to:

Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors [2001] 3 CLJ 864 CA ***(foll)***

Majumder v. Attorney-General of Sarawak [1967] 1 MLJ 101 FC ***(foll)***

Maleb Su v. PP [1984] 1 MLJ 311 ***(foll)***

PP v. Hoo Chang Chwen [1962] 28 MLJ 284 ***(foll)***

PP v. RK Menon & Anor [1978] 2 MLJ 152 ***(foll)***

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 3

Criminal Procedure Code, ss. 129(i)(b), 307(i)

National Land Code, ss. 258(2)(a), 259(1), (2)(a), (b)

Rules of the High Court 1980, O. 3 r. 2(3), O. 56 r. 1(1)

For the plaintiff - Wong Fook Meng; M/s Chee Siah Le Kee & Partners

For the intervener - Shaari Nor; M/s Shaari Nor & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (25) lodged by the appellant-intervener ("the intervener") against the decision of the learned registrar ("the registrar") who had allowed one Khoo Guan Swee ("Khoo") to offer a bid at 9.40am ie, after 9.15am in a public auction on 17 May 2004.

The intervener in seeking to set aside the said decision is also praying for a declaration that the intervener is the sole successful bidder at the reserve price of RM435,000.

Factual Background

Pursuant to an order for sale, a piece of land held under PT. No. 1666 H.S.(D) 33856 ("the land") in the mukim of Krubong, Melaka was to be sold on 17 May 2004.

Upon hearing a summons for directions, the registrar has on 25 March 2004 made an order ("the registrar's order") wherein para 1 reads:

> (1) Jualan hendaklah dijalankan pada 17hb. Mei 2004 pada pukul 9.15 pagi atau pada waktu lain yang Penolong Kanan Pendaftar fikirkan sesuai pada tarikh lelong di bilik lelongan, Mahkamah Tinggi.

[My translation:

The sale shall be held on 17 May 2004 at 9.15am or at such other time which the Senior Assistant Registrar thinks fit on the auction date in the auction room of the High Court.] (emphasis added)

The registrar's order has also been specifically stated in the introductory paragraph of the proclamation of sale which also contains the conditions of sale. Condition 5 provides as follows:

> Tertakluk kepada harga rizab, penawar yang tertinggi, jika dibenarkan oleh Timbalan Pendaftar, Mahkamah Tinggi, Melaka akan menjadi pembeli dan Timbalan Pendaftar mempunyai kuasa untuk menolak sebarang tawaran. Jika ada apa-apa pertikaian yang timbul mengenai penawar yang tertinggi sekali, maka ianya itu akan mengikut budi bicara Timbalan Pendaftar untuk menjual dan melelong semula atau Timbalan Pendaftar akan memutuskan pertikaian tersebut. Setiap keputusan Timbalan Pendaftar adalah muktamad.

[My translation:

Subject to the reserve price, the highest bidder, if allowed by the Deputy Registrar, High Court Melaka shall become the purchaser and the Deputy Registrar has the power to reject any bid. If there is any dispute which arises in connection with the highest bidder, then the Deputy Registrar may in his discretion order a resale and re-auction or resolve the dispute. Every decision of the Deputy Registrar shall be final.]

One Chua Chin Yap, the managing director of the intervener, was in the auction room of this court at 8.40am on that day to offer his bid for the land. He filled in the prescribed form and surrendered it together with his identity card and a bank draft for RM43,500 as deposit to the court bailiff before 9.15am, all of which were received by the bailiff.

At 9.40am, the registrar went to the auction room to conduct the auction. He was assisted by the bailiff and a licensed auctioneer. In the auction room, Khoo met the registrar to whom he made an oral application for leave to be registered as a bidder in order to offer his bid after 9.15am on the grounds that:

1. He had arrived at the auction room at 9.25am ie, 10 minutes after the bailiff had closed the registration for bidding;

2. He had with him a bank draft for RM49,000, being slightly more than 10% of the reserve price;

3. The 10 minutes delay was caused by his being unfamiliar with the auction room of the court as this was his first visit to the court; and

4. He was keen to bid for the land which is adjoining his land.

The intervener vehemently objected to the said oral application for late registration, but the objection was overruled by the registrar, in the exercise of his discretion to extend the time for registration.

The auction then proceeded with the offer of bids from the two aforesaid bidders, which concluded with the intervener as the successful bidder at the purchase consideration of RM521,000.

Issues For Determination

There are two issues for determination *viz*:

1. Whether on the aforesaid facts the registrar's extension of time is appealable? and

2. Whether the registrar who conducted the auction has the discretion to grant an extension of time to allow late registration of bidders after the bailiff has closed the registration at 9.15am?

Intervener's Right Of Appeal

For the plaintiff, learned counsel Mr. Wong Fook Meng submitted that the intervener had no right to appeal against the extension of time as it was a procedural ruling made in a public auction, which he said was not a "judgment, order or decision" within O. 56 r. 1(1) of the Rules of the High Court 1980 ("O. 56 r. 1(1)"); and s. 3 of the Courts of Judicature Act 1964 ("s. 3"). He relied on *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 117 CA; and *Maleb bin Su v. Public Prosecutor* [1984] 1 MLJ 311.

In this respect, the response of En. Shaari Nor, the intervener's learned counsel, is that the extension of time is a judgment, order or decision, as opposed to a procedural ruling because the intervener's rights as a bidder are affected.

In my judgment, the procedural law regulating appeals from the registrar to a judge in chambers is to be found in O. 56 r. 1(1) which merits reproduction as follows:

> (1) An appeal shall lie to a Judge in chambers from any judgment, order or decision of the Registrar. (emphasis added)

The Rules of the High Court 1980 does not provide for the definition of the words "judgment, order or decision".

However s. 3 defines the word "decision" as meaning judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

In *Syarikat Tingan Lumber Sdn Bhd, supra,* a judgment delivered by PS Gill JCA (now FCJ) held that the ruling of a registrar on an issue in regard to the admissibility of certain documents in the course of a hearing, for assessment of damages, was a ruling on an issue other than the ultimate question, and thus, excluded by the exclusion clause in the definition of "decision" in s. 3 (see p. 502 D-E).

In respect of criminal proceedings, s. 307(i) of the Criminal Procedure Code, where relevant, provides that any person who is dissatisfied with "any judgment, sentence or order" pronounced by any magistrate's court in any criminal cause or matter to which he is a party may prefer an appeal to the High Court against any such "judgment, sentence or order".

Section 307(i) was judicially considered by Hashim Yeop A Sani FJ (later CJ(M)), sitting as an appellate High Court Judge in *Maleb bin Su, supra,* in which the learned judge held, *inter alia*, that the dismissal by a magistrate of an application to disqualify himself from proceeding with the case did not finally dispose of the rights of the accused person and the order was not a proper order for appeal under s. 307(i). His Lordship added that the order must be a final order in the sense that it is final in effect as in the case of a judgment or a sentence, and that the test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties, as opposed to a purely procedural ruling. The learned judge gave two instances *viz*:

1. In *Public Prosecutor v. Hoo Chang Chwen* [1962] 28 MLJ 284 where Rose CJ of Singapore dealt with an appeal on the admissibility of certain documents and held that the ruling of the magistrate was a procedural ruling and therefore not an appealable order; and

2. In *Public Prosecutor v. R.K. Menon & Anor.* [1978] 2 MLJ 152 where Ajaib J (later SCJ) took the view that a ruling on non-compliance with s. 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

It is to be observed that the test for a party's right to appeal, be it in a civil or a criminal proceeding is the same ie, it is to be determined by the element of finality in disposing of the party's rights and not merely a purely procedural ruling.

Applying the principles enunciated above to the facts of this case, I am of the view that the mere registration of the intervener as a bidder in a public auction is merely the first step in the entire proceedings for the conduct of the auction. The proclamation of sale serves as an advertisement and a notification to the public at large of the place, date and time of the auction. It is trite law that it is an invitation to treat, as opposed to an offer to the public.

In *Majumder v. Attorney-General of Sarawak* [1967] 1 MLJ 101 FC, the Federal Court through the judgment of Harley Ag. CJ (Borneo) at p. 104 approved the decision of the learned trial judge to the effect that the advertisement was in fact merely "an invitation to treat" which could not be incorporated into the contract.

A similar conclusion was arrived at by the Court of Appeal in *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 3 CLJ 864.

The registration as a bidder can only give him the right to offer his bid at the auction. His subsequent bidding constitutes a mere offer to purchase. Condition 5 of the proclamation of sale has made it abundantly clear that the registrar has the power to reject any bid. In other words, the bid of the intervener is still subject to the conditions contained in the proclamation of sale. That being the case, during the period between the time of registration of the intervener as a bidder and the acceptance of the intervener's bid, the intervener's right remains a contingent and not a vested right.

Hence, the intervener's bid merely constituted an offer to purchase at the auction and unless the offer was accepted by the registrar pursuant to condition 5, no legally binding contract has yet been brought into existence. No contractual rights and obligations have been created at that stage.

In the circumstances, I hold that the extension of time granted by the registrar in order to allow Khoo to offer his bid in the public auction was a purely procedural ruling and does not finally dispose of the rights of the intervener as a bidder, in which case it does not come within the scope, ambit and purview of "judgment, order or decision" under O. 56 r. 1(1) read with s. 3.

However, I am prepared to assume that I have erred in my finding above and hence to proceed with the consideration and determination of the second issue as stated above on its merits.

Exercise Of Discretion

Learned counsel for the intervener submitted that the registrar had no discretion, as the proclamation of sale distributed to members of the public did set out the conditions of sale which must be complied with, under s. 258(2) of the National Land Code 1965 and O. 3 r. 2(3) of the Rules of the High Court 1980, as a result of which he contended that after 9.15am on 17 May 2004, there was no discretion to extend the time. He added that the extension was a wrong exercise of discretion, on the basis of misdirection of law in relation to s. 258(2) and s. 259(2), in that s. 258(2)(a) refers to the registrar's power to give directions pertaining to the conditions of sale before the auction, while s. 259(2) provides for the procedure at the auction.

The plaintiff's learned counsel relied on, *inter alia*, s. 259(1) & (2)(a) and (b) of the National Land Code 1965, and the registrar's order dated 25 March 2004 to support his contention that the registrar has the discretion to extend the time.

Having carefully considered the facts and circumstances together with the above submissions, I am of the view that the registrar's order granted pursuant to the summons for direction has made it abundantly clear and unambiguous that while the time for the auction has been fixed at 9.15am, the registrar may, in his subjective view, ie, as he thinks fit, hold the auction at any other time on the auction date. The registrar therefore has and may exercise his discretion so as to extend the auction time from 9.15am onwards so long as the auction is conducted on the auction date itself ie, 17 May 2004.

Further s. 259(1) and (2)(a) and (b) of the National Land Code 1965 read as follows:

259. Procedure at sale.

(1) Every sale pursuant to an order under section 256 shall take place under the direction of an officer of the Court, but this sub-section shall not prevent the Court from taking the assistance thereat of any licensed auctioneer.

(2) The officer under whose direction the sale takes place shall:

(a) receive the bids (including any bid by or on behalf of the chargee);

(b) settle summarily any question arising in the course of the proceedings;

(c) ...;

(d) ...

In my view, s. 259(1) provides for the auction to take place under the direction of the officer of the court. In this respect, the officer is the registrar. Section 259(2)(a) and (b) make it incumbent upon the registrar by way of a duty to receive the bids and settle summarily any question arising in the course of the proceedings. These provisions are sufficiently wide to encompass the extension of time granted by the registrar for the purposes of the registration of a bidder such Khoo as that was one of the questions that has arisen in the course of the proceedings relating to the auction.

In the circumstances, I am of the view that the registrar has not only exercised his discretion properly and reasonably pursuant to his own order granted on a summons for direction, but has also discharged his duties particularly under s. 259(2)(a) and (b). I therefore affirm his decision and hold that this appeal by the intervener is without merits and is hereby dismissed with costs.